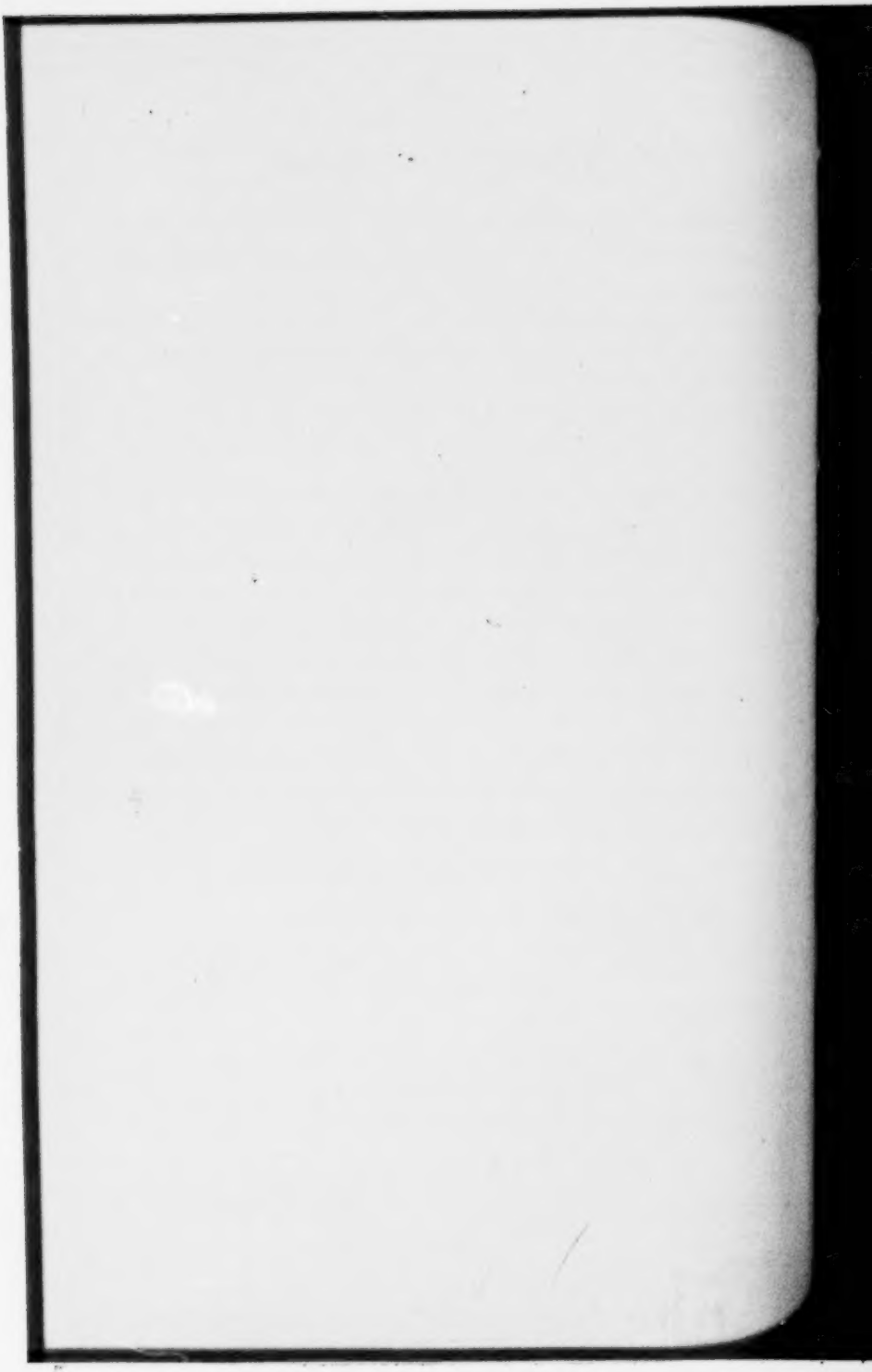

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 533

THE BOSTON RAILROAD HOLDING COMPANY AND THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Appellants,

vs.

THE DELAWARE AND HUDSON COMPANY, FREDERIC C. DUMAINE, JR., DUMAINES, A VOLUNTARY ASSOCIATION, AMOSKEAG COMPANY, J. LINZEE WELD AND J. HAROLD STEWART, TRUSTEES, JAMES B. THAYER, MAUDE BREWER LANG, CHARLES S. JENNEY, STUART C. WOODWORTH AND JAMES F. CLARKE, TRUSTEES, AND THE COMMONWEALTH OF MASSACHUSETTS,

Appellees

JURISDICTIONAL STATEMENT

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States the petitioners for the

allowance of their appeal in the above entitled proceeding hereby submit their jurisdictional statement.

I

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of this Court of the appeal is provided by Title 28, United States Code, Section 1257 (Act of June 25, 1948, Public Law 773 (H.R. 3214), 80th Congress, Second Session), which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

• • • • • • •

II

The State Statute, the Validity of Which Is Involved

The appeal involves the validity of Chapter 518 of the acts passed by the General Court of Massachusetts in the year 1946, approved June 11, 1946, and printed commencing at page 529 of the Acts and Resolves of Massachusetts, 1946. This statute reads as follows:

> "An Act to Dissolve Boston Railroad Holding Company
>
> *Whereas,* the deferred operation of this act would in part tend to defeat its purpose, which is to make immediately effective the termination of the corporate

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existence of the corporation therein referred to, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

Section 1. Boston Railroad Holding Company, organized under chapter five hundred and nineteen of the acts of nineteen hundred and nine, as amended, is hereby dissolved and its corporate existence is hereby terminated and annulled, subject to the provisions of section fifty-one of chapter one hundred and fifty-five of the General Laws, and subject to the other provisions hereof; provided, that the applicable provisions of section three of this act shall not apply if the holder of all the common stock of Boston Railroad Holding Company shall, on or before July first, nineteen hundred and forty-seven, transfer to Boston and Maine Railroad Company or its nominee, all of such stock; and provided, further, that in the event of such transfer, the holder of a majority of the preferred stock of Boston Railroad Holding Company shall, on or before July first, nineteen hundred and forty-eight, upon the basis of defaults in the payment of semi-annual dividends which have occurred prior to the effective date of this act, apply in person or by attorney to the supreme judicial court for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company which may, at the time of such application, comprise the assets of Boston Railroad Holding Company, in the manner and as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and chapter six hundred and thirty-nine of the acts of nineteen hundred and ten except as they may be modified by the provisions of this act.

Section 2. Nothing in this act shall be construed to affect any suit now pending by or against said corporation or any suits now pending or hereafter brought

for any liability now existing against the stockholders or officers of said corporation.

Section 3. If the holder of all the common stock of Boston Railroad Holding Company shall not on or before July first, nineteen hundred and forty-seven, transfer such stock to Boston and Maine Railroad Company or its nominee as provided in section one, or if, such transfer having been made, the holder or holders of a majority of the preferred stock of Boston Railroad Holding Company shall not have petitioned the supreme judicial court on or before July first, nineteen hundred and forty-eight, for an order for the sale of the stock, bonds, notes or other evidences of indebtedness of Boston and Maine Railroad Company in the manner and subject to the conditions as provided in said chapter five hundred and nineteen of the acts of nineteen hundred and nine and said chapter six hundred and thirty-nine of the acts of nineteen hundred and ten, then and in either of those events the supreme judicial court, upon application of the attorney general on behalf of the commonwealth, or upon application of a creditor or stockholder of Boston Railroad Holding Company, shall appoint a receiver to take charge of the estate and effects of said corporation and to collect the debts and property due and belonging to it, with power to prosecute and defend suits in its name or otherwise, to appoint agents under him and to do all other acts which might be done by said corporation, if in being, which may be necessary for the final settlement of its unfinished business. If such application is not made by the attorney general, the commonwealth shall be made a party to such proceedings. The powers of such receiver and the existence of said corporation may be continued only so long as the court finds necessary for said purposes. Said receiver shall have the right to vote the stock of Boston and Maine Railroad.

Section 4. Nothing in this act shall affect the rights of the holders of the publicly held or other preferred stock of Boston Railroad Holding Company, or the

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lien or liens or priority or priorities, existing in favor of such stock or any thereof. Said receiver shall distribute the assets in accordance with the rights of the respective parties in interest as determined by the court. Said distribution may be made by a sale of the assets of Boston Railroad Holding Company (including stock of Boston and Maine Railroad) and the distribution of cash, or by the distribution of such assets in kind; provided, that no distribution or sale of said stock of Boston and Maine Railroad shall be made pursuant to this act unless there shall have been furnished to the court by the department of public utilities satisfactory evidence showing that no distributee or purchaser (other than Boston and Maine Railroad) shall hold stock carrying more than five per cent of the total vote to which shareholders of Boston and Maine Railroad are then entitled; and provided, further, that no such sale or distribution shall be made before May first, nineteen hundred and forty-eight, except pursuant to plan of liquidation approved by a majority of each class of stock (including as a separate class the publicly held preferred stock if the court shall determine that such preferred has rights differing from the rights of the other preferred) of Boston Railroad Holding Company, and approved by the court as fair and equitable. A plan of liquidation may be presented by any creditor or stockholder of Boston Railroad Holding Company, or by the receiver, or by the attorney general of the commonwealth.

Section 5. Boston Railroad Holding Company is hereby prohibited from borrowing any money for the purpose of acquiring any of its preferred or common stock.

Section 6. Nothing in this act shall be construed to relieve the person who was the treasurer or assistant treasurer, or in his absence or incapacity who was any other principal officer, of said corporation from the obligation to make such tax returns in the current year as are required by law, and the tax liability of said cor-

poration shall be determined in accordance with the law of the commonwealth on the effective date of this act."

III

Date of Judgment or Decree Sought to Be Reviewed and Date of Presentation of Application for Appeal

The judgment and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered under date of October 4, 1948. A copy of the opinion rendered by the Supreme Judicial Court on that date is annexed hereto. The appeal is claimed from that rescript in accordance with the rule laid down by this Court in *Cole* v. *Violette,* 319 U. S. 581, and *Department of Banking* v. *Pink,* 317 U. S. 264. The petition for appeal is presented herewith on December 31, 1948.

IV

Nature of the Case and the Rulings Which Give Jurisdiction

The case is a purely statutory proceeding brought under s. 3 of St. 1946, Chapter 518. That statute, by s. 1, provides for immediate dissolution of the appellant Boston Railroad Holding Company and that its corporate existence be terminated and annulled. It is then provided in s. 3 that, in the factual situation which existed at the commencement of the proceeding "the supreme judicial court . . . shall appoint a receiver to take charge of the estate and effects of said corporation and to collect the debts and property due and belonging to it . . ." The statute also contains provisions directing the fashion in which the receiver when appointed should handle the property so confided to his charge and liquidate it. All powers and duties of the receiver stem entirely from the statute. The jurisdiction of the Supreme Judicial Court to make the

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appointment rests wholly on the statute and in entering the rescript appealed from the Supreme Judicial Court was not exercising any general equity jurisdiction.

The petition filed by the appellees alleged merely that they were stockholders of Boston Railroad Holding Company and that the conditions prescribed by St. 1946 Chapter 518 upon which the Supreme Judicial Court should appoint a receiver had been met. It contained but two prayers; first, that the Court should appoint a receiver as provided by the statute, and second, for general relief. Thereafter the appellant New York, New Haven and Hartford Railroad Company (herein referred to as the New Haven) was permitted to intervene as a party respondent and it and the other appellant (hereinafter referred to as the Holding Company) filed answers admitting the allegations of fact contained in the petition, but denying the validity of St. 1946 Chapter 518 and alleging on the basis of facts supporting the allegations, that the provisions of that statute would deprive them of their property without fair or just compensation in violation of Article XIV of the Amendments to the Constitution of the United States and that the statute constituted an attempt to impair the obligation of a contract contrary to the provisions of Article I, Section 10 of that Constitution.

The case was heard upon these pleadings and upon testimony and documentary evidence. The trial judge found facts and ruled against the appellants that St. 1946 Chapter 518 was constitutional and reported the case without further ruling to the full bench of the Supreme Judicial Court. That Court by the rescript already referred to affirmed the ruling of the single justice and established that the corporate existence of the appellant Holding Company had been terminated and annulled and that its property should be turned over to a receiver for liquidation in accordance with the provision of the statute.

It will be observed that this decree constituted a final adjudication and decision in favour of the validity of the statute and was not like a decree ordering appointment of a receiver on a creditor's bill or the like where the receiver is appointed in advance of the adjudication of the substantial rights of the parties and where the receivership is merely incidental to the substantive relief prayed and does not constitute the ultimate relief sought in the litigation.

The federal questions thus decided adversely to the appellants had the following basis:

The Holding Company was incorporated by special act of the Massachusetts Legislature, St. 1909 Chapter 519, for the sole purpose of holding securities of the Boston and Maine Railroad. The securities of that railroad which it acquired immediately following its incorporation had been owned by the New Haven. It had been determined in 1908 as a result of the decision in *Attorney General* v. *New York, New Haven & Hartford Railroad Co.*, 198 Mass. 413, that under the then Massachusetts law the New Haven could not lawfully own those securities. Statute 1909 Chapter 519 was consequently passed in order to provide a means by which the New Haven might lawfuly enjoy that measure of control of the Boston & Maine which inhered in the stock in question indirectly through ownership of stock of the Holding Company. Statute 1909 Chapter 519 was cast in the form of an offer which ripened into a contract between the Commonwealth and the New Haven upon the acceptance of its provisions by the New Haven through the purchase of stock of the Holding Company. It likewise constituted a contract between the Commonwealth and the Holding Company in the same fashion that every act of incorporation constitutes a contract between the incorporating sovereign and the corporators.

In 1909 there was contained in the then current general corporation statute of Massachusetts (St. 1903 Chapter 437)

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a provision reserving to the Commonwealth the right under certain circumstances to alter, amend, or repeal any corporate charter. At that time there was no similar provision in the Massachusetts constitution.

There is no room for dispute that St. 1946 Chapter 518, purports to put an end to the rights asserted by the appellants to be assured to them by the contract contained in St. 1909 Chapter 519. Neither can there be any dispute that if the Commonwealth had not reserved the power to terminate those rights at its pleasure and the appellants had those rights, St. 1946 Chapter 518 comes within the condemnation of the contract clause. The litigated issues on this point consequently were the construction of the 1909 statute to determine what rights the appellants obtained under it and the construction of that statute and of those portions of the 1903 statute which were incorporated in it by reference to determine the scope of the reserved power in the Commonwealth with a view to determining whether the 1946 statute constituted an exercise of that reserved power.

It is firmly established that the construction of a contract which a litigant alleges to have been impaired by state legislation is a federal question for the determination of this Court and that this Court is in no way bound by the construction of the state court.

Irving Trust Co. v. *Day*, 314 U. S. 556, 561;
Hale v. *Iowa State Board of Assessment and Review*, 302 U. S. 95, 101;
U. S. Mortgage Co. v. *Matthews*, 293 U. S. 232, 236;
Funkhauser v. *J. B. Preston Co.*, 290 U. S. 163, 167;
Schriver v. *Woodbine Savings Bank*, 285 U. S. 467, 475.

The construction of the contract is the first question presented for decision by the Court on this appeal.

Prior to the passage of St. 1909 Chapter 519 the Commonwealth and the New Haven were at odds over the matter of the control of the Boston and Maine Railroad. The Holding Company was formed as a means of composing those differences. The differences were to be ended through a settlement in contract form embodied in the statute. That underlay and constituted the background against which the terms of the contract must be construed. The appellants have never contended that under no circumstances could the form of the settlement be varied. The 1909 statute itself contained provisions permitting a change. The inclusion of these provisions and the object of the statute require a construction of the contract as a whole which cannot permit the reservation as a part of the contract by the Commonwealth of a capricious power to revoke which would render the entire contract aleatory. The language of the statutory power to amend contained in the 1903 statute, as carried forward by reference into the 1909 statute, must be construed in the light of these considerations. Patently the provisions of the 1903 statute, when passed, did not constitute an abdication of power by the Massachusetts Legislature thereafter to enter into contracts which should bind the Commonwealth and which should narrow the reserved power of amendment.

New Jersey v. *Yard*, 95 U. S. 104.

As already stated, St. 1909 Chapter 518 contained provisions confiding to the New Haven lawful indirect exercise of the power of control over the Boston and Maine through ownership of stock of the Holding Company. As already conceded, St. 1909 Chapter 518 did not provide that the right of the New Haven to enjoy that power must last forever. The Commonwealth was careful to reserve the specific right to put an end to the control. In section 4 it was provided

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that at any time upon one year's notice the Commonwealth might acquire all securities (including stock) issued by the Holding Company upon payment of compensation computed under the then current eminent domain statute. Such acquisition would, of course, put an end to all control of the Boston and Maine. In addition to this specific provision for termination St. 1909 Chapter 518 s. 1 also incorporated by reference section 2 of St. 1903 Chapter 437, which contains the general reserved power, and section 4 which provides for the right of perpetual duration subject to liquidation as provided in the statute (specifically as provided in St. 1903, Chapter 437, ss. 52 and 53).

Following the passage of St. 1909 Chapter 518 the New Haven promptly availed itself of the right so assured it, caused the Boston and Maine stock to be conveyed to the Holding Company and itself took the stock of the Holding Company. By so doing it invested something in excess of $30,000,000.

The submission of the appellants was and is that the 1909 statutory contract is to be construed as assuring to them the rights granted until they shall be ended in one of the fashions specifically provided in the statute. This construction was rejected by the Massachusetts court which held that the incorporation of the Holding Company was subject to the general capricious power of revocation which, it is said, the Commonwealth had reserved over every corporation thereafter created by special act by St. 1903 Chapter 437 s. 2. The correctness or incorrectness of that construction of the 1909 contract is the first question presented for determination by the Court.

The second question, which is closely related, is whether the provisions of St. 1946, Chapter 518 which govern any liquidation of the Boston and Maine securities by the receiver deprive the appellants of property without due proc-

ess. This question revolves around the provision of St. 1946 Chapter 518 s. 4 that under no circumstances shall the receiver dispose of Boston and Maine securities in such fashion as to leave any purchaser or distributee from him holding more than five per cent of the total voting power within the Boston and Maine. (There is an exception applicable only to sales to the Boston and Maine itself, but that is of slight if any present importance.) The stock owned by the Holding Company to which this limitation was applicable consisted of rather more than 219,000 shares of common, just short of 44,000 shares of prior preference, and about 10,500 shares of other preferred issues, each having one vote. Together this amounted to 26.2% of the total voting power of the Boston and Maine. Except for the prior preference stock the market value per share was pretty low, particularly in the case of the common. The chief value of the common, according to the contention of the appellants, lay in the control which it gave. As earnest of this value the appellant showed (among other things) that the appellee Delaware and Hudson Company had expended some $670,000 in 1944 in the purchase of 10,000 shares of stock of the Holding Company and had done so as a means of benefiting its position with the Boston and Maine. (The Delaware and Hudson Railroad connects with the Boston and Maine at Mechanicsville.) Under the five per cent limitation the largest block which could be sold or distributed would be just over 52,000 shares. No distribution in liquidation of the Boston and Maine stock could be made in kind among the Holding Company stockholders in the face of the limitation since the New Haven must have received its pro rata share as a Holding Company stockholder and that share would greatly exceed the permissible block of 52,000.

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The consequence was that the statute undertook to destroy completely so much of the value of the stock as arose from control. This the appellants insist constitutes a denial of due process.

Finally there is a third federal question, likewise arising out of the five per cent limitation. It appeared that the 26.2% of voting power which the Holding Company has constitutes control of the Boston and Maine. There is only one other stockholder having voting strength in the Boston and Maine as great as 1.2%. That is the Pennroad Corporation which holds over 201,000 shares which amounts to about 19% of the voting power. The five per cent limitation does not affect the Boston and Maine stock as a whole but only those shares owned by the Holding Company and it affects those only on the single disposition of them by the receiver. The statute does not forbid any later concentration of voting power or the later acquisition of control by interests other than the New Haven, as, for example, the appellees.

The immediate effect of the limitation must therefore be to give control of the Boston and Maine to the Pennroad Corporation and its only permanent effect must be to dissipate the control which the New Haven has and prevent the New Haven from obtaining anything in return for the control so taken away from it. The statute consequently is that sort of special legislation forbidden by the Constitution in that it denies the New Haven the equal protection of the laws.

To justify its conclusion that the statute was constitutional, the Massachusetts court announced three propositions. *First* it held that the reserved power to revoke contained in St. 1903 Chapter 437 s. 2 as applied to corporations created thereafter by special act (like the Holding Com-

pany) was subject to no subsequent qualification whatsoever. By so doing it construed the contract contained in St. 1909 Chapter 519 as completely aleatory and in effect held that there was no contract at all. In this, we submit, it erred. *Second* it held that the five per cent limitation did not constitute a deprivation of property without compensation, both on the ground that it was not satisfied that on liquidation the Boston and Maine stock would fetch less subject to the limitation than it would on an untrammelled sale and on the ground that even if the limitation would cause some shrinkage in value the legislature had warrant under the police power to cause that shrinkage. Here again, we submit that it erred on both grounds. *Third* it held, as a corollary to the first holding, that no question of equal protection was involved since the legislature was merely exercising its reserved power of revocation. Again, we submit, it erred.

V.

The Fashion in Which the Federal Point Was Raised

The issue of whether St. 1946, Chapter 518 was valid in the face of the contract clause and the fourteenth amendment was raised in the answer of each appellant. Each contained allegations of fact supporting the contention that the statute was unconstitutional. The contentions developed at the trial on this issue were summarized by the trial justice as follows:

> "The validity of St. 1946, c. 518, is challenged on various grounds. The New Haven contends that it entered into a contract with the Commonwealth in the terms expressed in St. 1909, c. 519; that it was entitled to enjoy the indirect control of the Boston and Maine through the ownership of the common stock of the Holding Company until such control should be ter-

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minated in accordance with the provisions of said c. 519; that the Legislature had no power to enact St. 1946, c. 518, depriving the New Haven of the benefits assured to it by c. 519 and taking away these benefits without compensation by a statute which is directed only against it and the Holding Company; that said c. 518 violates said c. 519 in that the former purports to terminate the corporate existence of the Holding Company without making G. L. (Ter. Ed.) c. 155, ss. 51, 52 applicable; that c. 518 does not constitute an exercise of the power reserved in c. 519 to dissolve the Holding Company and restricts and prevents the Holding Company and the New Haven from realizing the fair value of its property, and especially prevents the New Haven from receiving fair compensation for the rights and benefits assured to it by St. 1909, c. 519; and that St. 1946, c. 518, is not a valid exercise of the police power of the Commonwealth."

The Full Court likewise stated the constitutional issues with particularity. The court said in its opinion:

"The provisions of the pertinent statutes will be discussed with greater particularity, and further findings of the single justice will be referred to in the course of the consideration of the issues presented. These issues are raised by the respondents the holding company and the New Haven, both of which contend that the 1946 act, under which this proceeding is brought, is wholly unconstitutional and gives the court no jurisdiction whatever to entertain the petition. They set up three grounds for this contention.

"(1) They assert that the statutes of 1909 and 1910 created a contract or contracts between the Commonwealth on the one hand and the holding company and the New Haven or each of them on the other hand on the principle of Trustees of Dartmouth College v. Woodward, 4 Wheat., U. S. 518, 4 L. Ed. 629, and that the 1946 act impaired the obligation of this contract or these contracts contrary to the Constitution of the Commonwealth (see Wales v. Stetson, 2 Mass. 143,

146, 3 Am. Dec. 39; Opinion of the Justices, 9 Cush. 604, 610) and to art. 1, s. 10, of the Constitution of the United States (a) in that the provision of general laws allowing a period of three years for winding up the affairs of a dissolved corporation was, as these respondents say, included by reference in the 1909 act, and that, notwithstanding a similar reference in the 1946 act, this period was shortened by the provision of the 1946 act that 'The powers of * * * (the) receiver and the existence of * * * (the) corporation may be continued only so long as the court finds necessary for said purposes'; (b) in that the provision of the 1946 act that no sale or distribution of the holding company's stock in the Boston and Maine should be made before May 1, 1948, except pursuant to a plan of liquidation approved by a majority of each class of stock, is contrary to the provisions regulating liquidation in general laws incorporated by reference in the 1909 act; and especially (c) in that the proviso of the 1946 act to the effect that no distribution or sale of the holding company's Boston and Maine stock should be made whereby any distributee or purchaser (except the Boston and Maine itself) should hold stock carrying more than five per cent of the total voting power in the Boston and Maine is a clog upon liquidation not found in and inconsistent with general laws made applicable by the 1909 act.

"(2) These respondents further contend that the 1946 act deprives them of property without due process of law, and

"(3) that it denies to the New Haven equal protection of the laws. Although the considerations applicable to these three contentions are not wholly unrelated, it will nevertheless be convenient to consider the contentions separately."

The chief issues tried or argued were the three constitutional ones. The appellants relied unsuccessfully on the Massachusetts constitution also, but that, of course, is without interest on this appeal. Under Massachusetts

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practice requests for rulings, save in actions at law, are neither necessary nor appropriate, consequently none was filed.

See *Boston* v. *Dolan*, 298 Mass. 346, 349.

VI

The Questions Involved Are Substantial

From a monetary standpoint there can be no doubt that the questions are substantial. The New Haven had an investment of some $30,000,000 in the Boston and Maine through the Holding Company. That investment was valuable chiefly on account of the control it gave over the Boston and Maine. St. 1946 Chapter 518 purports to wipe out that element of value completely and to give nothing whatsoever by way of compensation.

The money involved, however, is of secondary importance for present purposes. What is most substantial is the question of whether the Commonwealth of Massachusetts in revising its relationship toward one of the three principal railroad systems within its confines and in readjusting the relationship between themselves of two of those systems has acted within the bounds of constitutionally permissible action. We are not here concerned with collateral or possibly unintended results of legislative action. Nor are we concerned with the effects of regulatory action by a state upon private rights and obligations only. In passing St. 1946 Chapter 518 the legislature was specifically and consciously undoing what it had done when it had passed St. 1909 Chapter 519. It had cast its 1909 statute in the form of a contract. Its 1946 statute purported to put an end to that contract. Where its own contractual obligations are involved a state must keep faith. When it attempts capriciously to denounce its contracts it raises precisely the sort

of substantial question which the Court should pass upon.

Further, it should be noted that the controversy is by no means local to Massachusetts. The underlying question is one of the relationships between interstate carriers. The Massachusetts court itself recognized this when in passing on the police power question it referred to the interstate nature of the railroads and said

> "There are three principal lines of railroad operating in this Commonwealth. All three are vital links between the industrial and populous eastern portion of the State and the continental interior of the country."

The rights and relations of the railroads and of the states have always been matters peculiarly within the concern of this Court. Whether one of the states after having entered into a contract with a railroad on a most important point may later renounce that contract certainly presents a substantial question.

JOHN L. HALL,
RICHARD WAIT,
Counsel for Appellants.

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APPENDIX "A"

QUA, C.J.

This petition was brought in this court by holders of so called "publicly held" preferred stock of the respondent Boston Railroad Holding Company, hereinafter called the holding company, against that company and the Commonwealth for the purpose of securing the appointment of a receiver to liquidate the affairs of the holding company, as provided in circumstances that have occurred, by St. 1946, c. 518, § 3.[1] The New York, New Haven and Hartford Railroad Company, hereinafter called the New Haven, has been allowed to intervene as a party respondent. The single justice, after hearing evidence and making findings of fact and rulings of law, reserved and reported the entire case for the consideration of the full court.

In 1907 the New Haven acquired one hundred nine thousand nine hundred forty-eight shares of the common stock of the Boston and Maine Railroad, hereinafter called the Boston and Maine. This acquisition was contrary to the policy of this Commonwealth as declared by St. 1874, c. 372, § 53, which at the time of the acquisition was embodied in St. 1906, c. 463, Part II, § 57. After the decision in *Attorney General* v. *New York, New Haven & Hartford Railroad,* 198 Mass. 413, whereby the New Haven was enjoined from holding certain other stocks acquired by it, the Boston and Maine stock above mentioned was transferred to a resident of Connecticut who "retained" it in that State. Thereafter the Legislature of this Commonwealth enacted St. 1909, c. 519, incorporating the holding company for the sole purpose of holding the securities, including stock, of the Boston and Maine. Section 1 of this act made applicable to the new corporation certain provisions of general laws, the material portions of which are dealt with later in this opinion. Section 3 provided that the stock of the Boston and Maine acquired by the holding company should not be sold by it without express authority from the Legislature.

---

[1] The statute requires that the Commonwealth be made a party.

Section 4 provided that any railroad then incorporated under the laws of this Commonwealth, as the New Haven was, might acquire stock of the holding company, which it might sell upon guaranteeing it, but not without express authority of the Legislature; that the Commonwealth might by act of the Legislature take or acquire such stock by purchase or otherwise, provided that such taking or purchase should include all the securities of the holding company; and that the acquisition by any railroad of the stock of the holding company should be deemed an acceptance by the railroad of all the terms and provisions of the act.

By St. 1910, c. 639, the holding company was given authority to issue preferred stock without voting power (§ 1). It was also provided that the preferred stock should constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine held by the holding company (§ 2), and that, subject to the right of the Commonwealth reserved by the act of 1909 to purchase or acquire the preferred stock of the holding company, this court might enforce the lien by sale of the Boston and Maine stock (§ 4).

The New Haven brought in to the holding company the one hundred nine thousand nine hundred forty-eight shares of Boston and Maine stock which it had acquired in 1907, and received in exchange for those shares and additional shares acquired later (representing a total original investment by the New Haven of slightly over $30,000,000, but subsequently greatly depreciated in value) all the common stock of the holding company. This gave to the New Haven complete voting control in the holding company. The New Haven also acquired the preferred stock of the holding company, of which it still holds two hundred forty-seven thousand seven hundred fifty-nine shares out of a total of two hundred seventy-one thousand nine hundred nine shares. The remaining twenty-four thousand one hundred fifty shares of preferred, called the publicly held preferred stock, were guaranteed as to dividends by the New Haven and were sold by it to the public. This is the stock which the petitioners now hold in part. Through its control of the holding company and the latter's ownership of stock in the Boston and Maine, the New Haven has control of

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twenty-six and two tenths per cent of the voting power in the Boston and Maine. For further history of the relations between the holding company and the New Haven see *Codman* v. *New York, New Haven & Hartford Railroad*, 253 Mass. 144.

Statute 1946, c. 518, under which this proceeding is instituted, dissolves the holding company, subject to the provisions of G. L. (Ter. Ed.) c. 155, § 51, which continues the corporation for three years as a body corporate for the purpose of prosecuting and defending suits and of enabling it gradually to settle and close its affairs, dispose of its property and divide its stock. The 1946 act also provides that the powers of the receiver appointed by this court to wind up the affairs of the corporation and the existence of the corporation may be continued only so long as the court finds necessary for those purposes; that nothing in the act shall affect the lien or priority of the preferred stock; but that no distribution in kind or sale of the company's assets shall be made unless the department of public utilities shall have furnished to the court satisfactory evidence showing that no distributee or purchaser (other than the Boston and Maine itself) shall hold stock carrying more than five per cent of the total voting power in the Boston and Maine; and that no sale or distribution shall be made before May 1, 1948, except pursuant to a plan of liquidation approved by a majority of each class of stock in the holding company and by the court as fair and equitable.

The provisions of the pertinent statutes will be discussed with greater particularity, and further findings of the single justice will be referred to in the course of the consideration of the issues presented. These issues are raised by the respondents the holding company and the New Haven, both of which contend that the 1946 act, under which this proceeding is brought, is wholly unconstitutional and gives the court no jurisdiction whatever to entertain the petition. They set up three grounds for this contention.

(1) They assert that the statutes of 1909 and 1910 created a contract or contracts between the Commonwealth on the one hand and the holding company and the New Haven or each of them on the other hand on the principle of *Trustees*

of Dartmouth College v. *Woodward*, 4 Wheat. 518, and that the 1946 act impaired the obligation of this contract or these contracts contrary to the Constitution of the Commonwealth (see *Wales* v. *Stetson*, 2 Mass. 143, 146; *Opinion of the Justices*, 9 Cush. 604, 610) and to art. 1, § 10, of the Constitution of the United States (a) in that the provision of general laws allowing a period of three years for winding up the affairs of a dissolved corporation was, as these respondents say, included by reference in the 1909 act, and that, notwithstanding a similar reference in the 1946 act, this period was shortened by the provision of the 1946 act that "The powers of . . . [the] receiver and the existence of . . . [the] corporation may be continued only so long as the court finds necessary for said purposes"; (b) in that the provision of the 1946 act that no sale or distribution of the holding company's stock in the Boston and Maine should be made before May 1, 1948, except pursuant to a plan of liquidation approved by a majority of each class of stock, is contrary to the provisions regulating liquidation in general laws incorporated by reference in the 1909 act; and especially (c) in that the proviso of the 1946 act to the effect that no distribution or sale of the holding company's Boston and Maine stock should be made whereby any distributee or purchaser (except the Boston and Maine itself) should hold stock carrying more than five per cent of the total voting power in the Boston and Maine is a clog upon liquidation not found in and inconsistent with general laws made applicable by the 1909 act.

(2) These respondents further contend that the 1946 act deprives them of property without due process of law, and

(3) That it denies to the New Haven equal protection of the laws.

Although the considerations applicable to these three contentions are not wholly unrelated, it will nevertheless be convenient to consider the contentions separately.

1. The acts of 1909 and 1910 did not, separately or together, create a contract between the Commonwealth and the holding company or the New Haven or both of them which would prevent the alteration of their relations in the manner brought about by the 1946 act. Ample safeguards

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were provided to prevent such a result. One of the sections of general laws subject to which the holding company was incorporated according to § 1 of the 1909 act was § 2 of c. 437 of the acts of 1903, known as the business corporation law. (See now G. L. [Ter. Ed.] c. 155, § 3.) Said § 2 contained this provision, "The charters of all corporations which are subject to the provisions of this act and which have been incorporated by special law since the eleventh day of March in the year eighteen hundred and thirty-one and all of such corporations as may be hereafter incorporated by special law shall be subject to amendment, alteration or repeal by the general court." The holding company was thereafter incorporated by special law. The provision just quoted was applicable to the holding company and was substantially the same provision of which the Supreme Court of the United States said through Mr. Justice Miller in *Greenwood* v. *Freight Co.* 105 U. S. 13, at page 17, "It would be difficult to supply language more comprehensive or expressive than this." He added that the Legislature need give no reason for its action, and that "The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it" (105 U. S. at page 17). It is true that at the time of that decision the statute (then Gen. Sts. c. 68, § 41) used the words "at the pleasure of the legislature" at the close of the quotation instead of the more simple expression "by the general court" found in St. 1903, c. 437, § 2, and that Mr. Justice Miller commented upon the former wording; but we are confident that this change of words in the course of revision was not intended to change the force and effect of the provision.

As supporting the proposition that there is from the purely contractual standpoint no impairment of a contract in the face of such a provision, we also cite the following: *Hamilton Gas Light & Coke Co.* v. *Hamilton,* 146 U. S. 258, 269-271, *Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 644, *Calder* v. *Michigan,* 218 U. S. 591, *Sears* v. *Akron,* 246 U. S. 242, 249, *Coombes* v. *Getz,* 285 U. S. 434, 441, *Public Service Commission of Puerto Rico* v. *Havemeyer,* 296 U. S. 506, 517, *Phillips Petroleum Co.* v. *Jenkins,* 297

U. S. 629, 634-635, *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 451, *Thornton* v. *Marginal Freight Railway*, 123 Mass. 32. And see in general *Newton* v. *Commissioners*, 100 U. S. 548, 561.

The respondents the holding company and the New Haven have argued that §§ 52 and 53 of St. 1903, c. 437, relating to the method of liquidation, although not specifically mentioned in the 1909 act, were also incorporated into that act by the reference therein to St. 1903, c. 437, § 2, in the first sentence of which §§ 52 and 53 are mentioned. But that first sentence refers only to "Corporations organized under general laws," and the holding company was incorporated by special law. This distinction between corporations organized under general laws and corporations incorporated by special law runs all through § 2 of the act of 1903 as well as through the preceding § 1. It seems plain that the provisions of § 2 which were intended to be made applicable to the holding company by § 1 of the 1909 act were only those provisions that had reference to the type of corporation to which the holding company belonged,[2] and that there was nothing in the 1909 act to qualify the broad effect of the words hereinbefore quoted as reserving to the Legislature absolute powers of amendment, alteration, and repeal in so far as relates to any question of contract between the Commonwealth and the holding company and a fortiori between the Commonwealth and the New Haven. It should be added that the provision for "perpetual succession" in St. 1903, c. 437, § 4 (a), and the provision that corporations subject to that act should be dissolved or have their affairs wound up "in the manner hereinafter provided" in § 4 (i), on both of which the respondents the holding company and the New Haven in

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[2] Liquidation provisions similar to those found in St. 1903, c. 437, §§ 52, 53, formerly applied both to corporations organized under general laws and to those incorporated by special law. R. L. c. 109, § 3. But this section was repealed as to business corporations by St. 1903, c. 437, § 95, and § 2 of that act was substituted. General application of the liquidation provisions to corporations incorporated by special law was not restored until the enactment of G. L. c. 155, § 3, too late to affect any question of contract in this case.

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part rely, were likewise subject to "amendment, alteration or repeal" under § 2.

There was nothing in the act of 1910 that created any permanently binding contract. That act was an amendment of the 1909 act and was itself subject to the powers of amendment and repeal contained in St. 1903, c. 437, § 2. *Roxbury* v. *Boston & Providence Railroad,* 6 Cush. 424, 431-432. *Granara* v. *Italian Catholic Cemetery Association,* 218 Mass. 387, 391. *Miller* v. *State,* 15 Wall. 478, 492-495. *Holyoke Co.* v. *Lyman,* 15 Wall. 500, 522. *Phillips Petroleum Co.* v. *Jenkins,* 297 U. S. 629, 634.

We have given no consideration to art. 59 of the Amendments to the Constitution of Massachusetts, since that article was not adopted until after 1910. *Boston Elevated Railway* v. *Commonwealth,* 310 Mass. 528, 549. And in dealing with the alleged impairment of contractual obligations we have not found it necessary to consider whether the act of 1946 could not in any event stand as a valid exercise of the so called police power. See *Opinion of the Justices,* 293 Mass. 589, 600-601; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 434-437; *Veix* v. *Sixth Ward Building & Loan Association of Newark,* 310 U. S. 32, 38-39. The police power is discussed later in this opinion in connection with the second contention of the respondents the holding company and the New Haven.

2. In our opinion St. 1946, c. 518, does not deprive the holding company or the New Haven of property without due process of law.

It is plain from what has already been said that the Legislature had the power to dissolve the holding company and to provide for its liquidation in a reasonable manner. No contention is made that, apart from alleged unconstitutional violation of contract, such dissolution and liquidation would in themselves constitute a deprivation of property. No contention is made that, apart from contract, the Legislature was under any obligation to provide for continuance, after dissolution of the holding company, of the twenty-six and two tenths per cent control of voting power in the Boston and Maine which the New Haven had enjoyed while the holding company existed, subject to the provisions of

the holding company's charter designed to protect the public against misuse of this power. On the branch of the case with which we are now dealing the contention of the respondents the holding company and the New Haven is in substance that the manner of liquidation is not fair to them and will result in loss of value because of the proviso designed to prevent any purchaser or distributee from holding stock carrying more than five per cent of the voting power of the Boston and Maine. It is argued that this proviso will militate against securing the best price for the Boston and Maine stock. There seem to us to be two answers to this contention.

One answer is that on oral evidence which was more or less conflicting and subject to differing inferences the single justice made a finding of fact that he was "not satisfied" that the five per cent proviso would "result in the receiver obtaining less than the fair market value of these stocks." We cannot say that this finding is plainly wrong, and it must stand, even if we assume that this court has the same power to review findings of fact in this statutory proceeding that it would have in an ordinary suit in equity. See *Lowell Bar Association* v. *Loeb*, 315 Mass. 176, 178. Because of this finding it does not appear that either of the objecting respondents has been deprived of any property by the 1946 act.

But we think there is another answer. All property is held subject to the power and duty of the Legislature, from time to time, to make, ordain, and establish all manner of wholesome and reasonable laws, not contrary to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth. Constitution of Massachusetts, c. 1, § 1, art. 4. This power, which resides in every sovereign state, has, unfortunately we think, come to be called the police power. It is manifest that the necessary and proper exercise of this power will frequently limit and restrict the freedom of action which particular persons and corporations would otherwise enjoy in the management and control of their property, and that such limitation and restriction do not constitute a taking of property for which compensation must be allowed. Not infrequently it becomes a question

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of great difficulty whether a regulation of property rights is a permissible exercise of general legislative power or is a deprivation of property without compensation. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393. The so called police power is discussed at length in the recent case of *Boston Elevated Railway* v. *Commonwealth,* 310 Mass. 528. Extended discussion here would serve no purpose. Reference may be had to such cases as *Commonwealth* v. *Alger,* 7 Cush. 53, *Newton* v. *Joyce,* 166 Mass. 83, *Chase* v. *Proprietors of Revere House,* 232 Mass. 88, 98, *Lowell Co-operative Bank* v. *Co-operative Central Bank,* 287 Mass. 338, *Howes Brothers Co.* v. *Unemployment Compensation Commission,* 296 Mass. 275, 282-285, *Euclid* v. *Ambler Realty Co.* 272 U. S. 365, and *Nebbia* v. *New York,* 291 U. S. 502.

The holding company held its stock in the Boston and Maine and the New Haven held its stock in the holding company subject to this power. It is trite, but still useful, to repeat that "Every rational presumption will be indulged in favor of the validity of an act of the legislative department of government and the court will not refuse enforcement unless its conflict with the Constitution is established beyond reasonable doubt." *Commonwealth* v. *S. S. Kresge Co.* 267 Mass. 145, 148. There are three principal lines of railroad operating in this Commonwealth. All three are vital links between the industrial and populous eastern portion of the State and the continental interior of the country. It is fair to infer that these lines are actual competitors. Certainly they are potential competitors to a high degree. The public has a very large stake in the matter of control of these means of transportation. We cannot say that the Legislature could not reasonably conclude that the welfare of the Commonwealth requires that there be a wide distribution of the stock of one of these three main lines, so that unrestricted control will not again readily fall into the hands of another of them or of some other interest seeking control for purposes antagonistic to the interests of the Commonwealth, as soon as the protection afforded the Commonwealth by the holding company has disappeared. See *Attorney General* v. *New York, New Haven & Hartford Railroad,* 198 Mass. 413, 425-426. The

five per cent clause seems a rational provision adapted to secure the public welfare in this regard, even though it does not amount to an absolute guaranty that some single interest may not again secure control.

This clause is not as restrictive as it might at first sight seem to be. It will permit the sale of Boston and Maine stock in blocks as large as fifty-two thousand three hundred six shares. This will allow the sale in one block of all the prior preference stock and the sale in one block of each of the lettered issues of preferred stock or of all the lettered issues taken together. The expert who testified on the subject gave his opinion, in substance, that the way to sell these stocks would be in blocks by themselves. Even the common stock can be sold, if desired, in no more than five blocks. The expert testified at one point that this was the obvious way to sell it—to reduce it to units "that would be negotiable." The financial position in recent years of both the Boston and Maine and the New Haven as disclosed in the record and as matter of common knowledge has a tendency to throw serious doubt upon the money value of control. Under the provisions of the 1946 act there will be no forced sale. Sales will be made subject to the control and approval of this court as to price. The lien of the preferred stock of the holding company upon the stock of the Boston and Maine created by the 1910 act is preserved. St. 1946, c. 518, § 4. The worst that can be said of the five per cent proviso is that conceivably it might have some adverse effect upon prices. On the other hand there is some evidence tending to show that it might even have an advantageous effect upon prices, and that it would be unwise to try to sell in larger blocks than those permitted. It is also to be remembered that as matters stood under the 1909 act before the passage of the 1946 act these stocks could not be sold at all "without express authority from the legislature." St. 1909, c. 519, § 3.

In view of the high public interest involved in the disposition of these railroad stocks and of the relatively slight impediment to their sale involved in the five per cent proviso, even if it might possibly cause some loss, we incline to the opinion that the restriction contained in the 1946

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act does not reach beyond permissible regulation under the general powers of the Legislature and is not a taking of property without compensation or without due process of law. In the circumstances it seems to us immaterial that the legislation takes the form of a special act applicable to a particular situation, of which only one instance exists, instead of being formulated, as doubtless it might have been, in the shape of a general law. As was said in *Brown* v. *Boston & Maine Railroad*, 233 Mass. 502, at page 511, "For many years all legislation respecting railroads was by special act. Because certain general laws have been passed is no reason why in appropriate instances special acts may not still be enacted."

We are aided in reaching the conclusion that the five per cent provision is within the police power by the recent decisions of the Supreme Court of the United States in *North American Co.* v. *Securities & Exchange Commission*, 327 U. S. 686, 707-710, and *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U. S. 90, 106, et seq. Under the authority of these decisions it would seem that the legislative power may, in the interest of the public welfare, authorize the compulsory divestment of vast assets of holding companies, involving the element of control, at least where actual material destruction of value is not shown by plenary proof.

3. The contention of the respondents the holding company and the New Haven that St. 1946, c. 518, denies to the New Haven the equal protection of the laws rests upon the facts that the Pennroad Corporation, not shown to have been incorporated in this Commonwealth, held approximately nineteen per cent of the voting power in the Boston and Maine as against the twenty-six and two tenths per cent held by the holding company, and that Pennroad was not affected in its rights in its holdings by the five per cent provision. But the subject matter of the 1946 act was the dissolution and liquidation of the holding company, a Massachusetts corporation, under a reserved power. We do not see that either Constitution required the Legislature so to exercise such a reserved power as to affect in the same way all owners, domestic or foreign, of Boston and Maine stock,

including such owners as were in no way involved in the liquidation of the holding company. We do not reach the question whether in any event the Legislature might distinguish between nineteen per cent and twenty-six and two tenths per cent.

4. Two questions of evidence are reported. We see no error in excluding either the letter of a vice-president of the New Haven to its president dated April 15, 1909, or the message of the Governor to the Legislature of April 20 in that year. The statutes speak for themselves as to their construction and effect. The excluded exhibits, even if otherwise competent, which we do not imply, contain nothing of assistance upon any doubtful question of interpretation. Our conclusions and the outcome of the case would have been precisely the same if they had been admitted.

The result of this opinion is that a receiver is to be appointed for the Boston Railroad Holding Company in accordance with § 3 of St. 1946, c. 518, and further proceedings are to be had in accordance with that statute. A decree is to be entered to that effect.

So ordered.

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MARCH 28, 1949.

Per Curiam Decisions.

No. 533. BOSTON RAILROAD HOLDING CO. ET AL. *v.* DELAWARE & HUDSON CO. ET AL. Appeal from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *John L. Hall* and *Richard Wait* for appellants. Reported below: 323 Mass. 282, 81 N. E. 2d 553.

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